

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2009CF0022
)	EEOC NO.: 21BA82403
ALBERTO HERNANDEZ)	ALS NO.: 09-0375
)	
Petitioner.)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners David Chang, Marylee V. Freeman and Yonnie Stroger presiding, upon Alberto Hernandez's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")¹ of Charge No. 2009CF0022; and the Commission having reviewed *de novo* the Respondent's investigation file, including the Investigation Report and the Petitioner's Request, and the Respondent's response to the Petitioner's Request; and the Commission being fully advised upon the premises;

NOW, THEREFORE, it is hereby **ORDERED** that the Respondent's dismissal of the Petitioner's charge is **SUSTAINED** on the following grounds:

LACK OF SUBSTANTIAL EVIDENCE and LACK OF JURISDICTION

In support of which determination the Commission states the following findings of fact and reasons:

1. On July 7, 2008, the Petitioner filed a charge of discrimination with the Respondent in which he alleged his former employer, Berry Knight Plastics ("Employer"), failed to accommodate his disability, diabetes (Count A); forbade him to speak Spanish because of his ancestry, Hispanic (Count B); harassed him because of his ancestry (Count C); and discharged him because of his disability (Count D) and his ancestry (Count E), all in violation of Section 2-102(A) of the Illinois Human Rights Act (the "Act"). On June 11, 2009, the Respondent dismissed Count B for Lack of Jurisdiction, and dismissed the remaining Counts A and C-E for Lack of Substantial Evidence. The Petitioner filed a timely Request on July 15, 2009.

¹ In a Request for Review Proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge requesting review of the Department's action shall be referred to as the "Petitioner."

2. The Petitioner worked for the Employer as a Mold Technician. At the time of the Petitioner's employment, the Employer had in place General Work Rules. The General Work Rules provided that an employee could be subject to discipline up to and including termination if the employee accumulated more than three written warnings during a two-year period of time.
3. The Petitioner's prior supervisor, R. Jackson, did not permit the Petitioner to speak Spanish in the workplace. R. Jackson last supervised the Petitioner in 2004. Thereafter, the Petitioner began working under a new supervisor, Mike Roewer. The Petitioner does not allege that Roewer forbade him from speaking Spanish in the workplace.
4. The Petitioner alleged Roewer and his co-workers harassed him between January 9, 2008, and January 22, 2008, because of the Petitioner's Hispanic ancestry, in that they made fun of him for being overweight, made fun of the way he walked, of his Spanish-accented speech, told him he had to work more because he was Hispanic, and denied his requests for breaks.
5. The Petitioner further contends the Employer failed to accommodate his disability by denying his requests to take additional breaks in order to check his blood sugar and to eat in order to maintain proper blood sugar levels. The Petitioner recalled giving doctor's notes to Roewer and to Olga Ortiz, a Human Resources Manager. The notes stated the Petitioner had been diagnosed with diabetes. However, the Petitioner admits the notes did not state the Petitioner needed to take regular breaks because of his disability.
6. The Petitioner could not recall what dates Roewer allegedly denied his requests for additional breaks. The Petitioner also does not provide any evidence he informed Roewer he was requesting the additional breaks as an accommodation for his disability. Finally, the Petitioner admitted Roewer routinely denied breaks to other employees, and that Roewer sometimes interrupted an employee's break, requiring the employee to return to work.
7. The Petitioner was discharged on January 22, 2008. The Employer stated the Petitioner was discharged because the Petitioner had violated its General Work Rules, in that the Petitioner had accumulated more than three written warnings within a two-year period of time.
8. There is undisputed evidence in the file that the Petitioner had accumulated six written warnings between April 13, 2006, and January 23, 2008. However, the Petitioner contends he was discharged because of his disability and because of his Hispanic ancestry.
9. In support of his Request, the Petitioner provides written statements from three former co-workers. The statements allege the Employer had also discriminated against them. However, none of these witnesses provided any additional evidence in support of the Petitioner's claim.

Conclusion

The Commission's review of the Respondent's investigation file leads it to conclude the Respondent properly dismissed the Petitioner's charge for lack of substantial evidence and for lack of jurisdiction. If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. See 775 ILCS 5/7A-102(D). Furthermore, if a charge is untimely filed with the Respondent, the Respondent shall be deprived of jurisdiction to investigate the charge. See 775 ILCS 5/7A-102(a).

Count B: Lack of Jurisdiction

Section 7A-102(a) of the Act states that a charge must be filed with the Respondent within 180 days after the date that a civil rights violation allegedly has been committed. Failure to file within the prescribed time period deprives the Respondent of jurisdiction to investigate the charge. See Trembczynski v. Human Rights Commission, 252 Ill.App.3d 966, 625 N.E.2d 215, 218 (1st Dist. 1993).

Forcing the Petitioner to refrain from speaking Spanish at work was indeed a violation of the Act. However, the Petitioner alleged he was last instructed not to speak Spanish in 2004. The Petitioner does not allege his current supervisor, Roewer forced him to refrain from speaking Spanish at work, nor is there any evidence in the file that this discriminatory practice has been continued or enforced by the Petitioner's current supervisor. The evidence shows the alleged violation last occurred in 2004. The Petitioner filed his charge in July 2008, which is more than 180 days after the date of this alleged civil rights violation. Therefore, the Respondent correctly determined it did not have jurisdiction to investigate Count B because it was untimely filed.

Counts A, C, D and E: Lack of Substantial Evidence

Count A was properly dismissed for lack of substantial evidence because there is no evidence in the file the Petitioner specifically requested the additional breaks as an accommodation for his disability. Pursuant to 56 Ill. Admin. Code, Ch. II, Section 2520.440(d)(3)(ii), the Petitioner had an affirmative duty to apprise the Employer of his need for an accommodation: . . . "It is the duty of the individual seeking accommodation to apprise the employer or labor organization involved of his disabling condition and submit any necessary medical documentation . . . and must cooperate in any ensuing discussion and evaluation aimed at determining the possible or feasible accommodations."

In this case, assuming the Petitioner did in fact ask for breaks, there is no evidence the Petitioner apprised the Employer, via Roewer, that he was requesting these breaks as an accommodation for his disability. In this case, the evidence shows the Employer treated the Petitioner the same as it did similarly situated non-disabled employees, since it appears the Employer routinely refused all of its employees' requests for breaks or routinely cut short their breaks.

As to Count C the Commission finds the Petitioner's ancestry harassment claim was properly dismissed for lack of substantial evidence. In order for the Petitioner to have demonstrated substantial evidence of ancestry harassment, there must have been evidence the Employer's conduct was motivated by a discriminatory intent and that the Petitioner was subjected to a pattern of incidents that was so pervasive, it constituted a different term and condition of employment based upon a discriminatory factor. See Henry and the Chicago Corporation, ___ Ill. HRC Rep. ___, Charge no. 1996CF2615, (ALS No. 9653) (February 2, 2001). The alleged conduct cannot be "sporadic"; instead, there must be some substantial evidence of a "steady barrage" of objectionable conduct motivated by ancestry to rise to the level of actionable harassment. See Larry Poulos and Olson RC, Inc., IHRC, ALS No. S05-152, March 17, 2009 (2009 WL 2382481).

In the Petitioner's case, the conduct was alleged to have occurred over a 13-day period of time. The Petitioner is unclear regarding how often the conduct occurred during that time period. As such, there is no substantial evidence in the file the Petitioner was subjected to a "steady barrage" of conduct motivated by his ancestry, such that the terms and conditions of the Petitioner's employment were affected.

Finally, the Commission sustains the dismissal of Counts D and E for lack of substantial evidence because there is no substantial evidence in the file the Employer's stated reason for discharging the Petitioner was a pretext for ancestry or disability discrimination. The undisputed evidence demonstrates the Petitioner was in violation of the Employer's General Work Rules at the time he was discharged. There is also evidence in the file the Employer had discharged a similarly situated, non-disabled, non-Hispanic employee for violating its General Work Rules, in that the employee had also accumulated more than three warnings in a two-year period. The evidence demonstrates the Petitioner was treated the same as similarly situated non-disabled, non-Hispanic employees.

Accordingly, it is the Commission's decision that the Petitioner has not presented any evidence to show that the Respondent's dismissal of his charge was not in accordance with the Act. The Petitioner's Request is not persuasive.

THEREFORE, IT IS HEREBY ORDERED THAT:

The dismissal of the Petitioner's charge is hereby **SUSTAINED**.

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This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and Berry Knight Plastics, as Respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this order.

STATE OF ILLINOIS)	
)	Entered this 10th day of February 2010.
HUMAN RIGHTS COMMISSION)	

Commissioner David Chang

Commissioner Marylee Freeman

Commissioner Yonnie Stroger